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8 *Attorneys for Defendants Chartis Property
Casualty Company and 21st Century North
American f/k/a American International
Insurance Company*

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 Marcus Labertew a/k/a Mark Labertew
13 and Jane Doe Labertew, husband and
wife; John McDermott a/k/a Jack
McDermott and Jennifer McDermott,
husband and wife,

15 Plaintiffs,

16 v.

17 Chartis Property Casualty Company,
18 otherwise known as AIG Casualty
Company, and 21st Century North
19 America Insurance Company, formerly
known as American International
Insurance Company,

20 Defendants.

CV-13-01785-PHX-DGC

STATEMENT OF FACTS IN
SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

{ORAL ARGUMENT REQUESTED}

(Assigned to the Honorable
David G. Campbell)

23 Defendants, pursuant to Fed.R.Civ.P. 56(a) and (c) and LRCiv. 56.1(a), submit
24 this Statement of Facts in Support of the Motion for Summary Judgment filed
25 contemporaneously herewith.

26 1. This action concerns an insurance coverage dispute between Plaintiffs
27 and Defendants, stemming from a homeowner's and excess liability insurance policy

1 issued by Defendants¹ to Loral Langemeier (“Langemeier”). (***Exhibit 1***,
2 Homeowner’s Insurance Policy (“HO Policy”), and ***Exhibit 2***, Excess Liability
3 Insurance Policy (“EL Policy”)).

4 2. The HO Policy is Numbered PCG 0002932963 and the Personal EL
5 Policy is Numbered PCG 0001088994 (collectively referred to as “Policies”). Each
6 policy had policy periods spanning June 26, 2009 to June 26, 2010, and each bearing
7 its own coverage provisions, terms, exclusions, and conditions. (***Exhibit 1*** and ***Exhibit***
8 ***2***).
9 3. The HO Policy contains policy Exclusions which state as follows:

10 **E. Exclusions**

11 This policy does not provide coverage for liability, defense costs or any other cost
12 or expense for:
13 * * * *

14 5. Directors Errors or Omissions

15 **Personal injury or property damage** arising out of any **insured person's**
16 acts, errors or omissions as an officer or member of the board of directors of
17 any corporation or organization. This exclusion does not apply to **personal**
18 **injury or property damage** arising out of an **insured person's** actions for a
19 non-profit corporation or organization or for a Condominium or Cooperative
20 Association unless another exclusion applies.
21 * * * *

22 11. Business Pursuits

23 **Personal injury or property damage** arising out of an **insured person's business**
24 property or **business** pursuits, investment activity or any activity intended to realize
25 a profit for either an **insured person** or others. However, this exclusion does not
26 apply to:
27 a. Volunteer work for an organized charitable, religious or community group;
28 b. **Incidental business** activity; or
29 c. **Limited Residence Premises Business** Liability Coverage.
30 * * * *

31 15. Contractual

32 **Personal injury or property damage** arising from contracts or agreements,
33 whether written or unwritten:
34

35

¹ Defendant American International Insurance Company (AIIC) has a relation to the
36 American International Group (AIG) and for purposes of this litigation the acronyms
37 have been used interchangeably. (See generally [Doc. 46] at 2:13-23 for the technical
38 relationship).

- a. Made in connection with any **insured person's business**; or
 - b. In which the liability of others is assumed after a covered loss.

* * * *

17. Intentional Acts

Personal injury or property damage resulting from any criminal, willful, intentional or malicious act or omission by any person. We also will not cover claims for acts or omissions of any person which are intended to result in, or would be expected by a reasonable person to cause, **property damage** or **personal injury**. This exclusion applies even if the injury or damage is of a different kind or degree, or is sustained by a different person, than expected or intended. This exclusion does not apply to **bodily injury** if the **insured person** acted with reasonable force to protect any person or property.

(*Exhibit 1*, at pp. AIG00019-AIG00020).

4. The EL Policy contains the following Exclusions:

PART V – WHAT IS NOT COVERED - EXCLUSIONS

A. As respects Excess Liability, Limited Employment Practices Liability and Limited Charitable Board Directors and Trustees Liability:

This insurance does not provide coverage for liability, defense costs or any other cost or expense:

* * * *

6. Business Pursuits

Arising out of an **insured person's business** property or **business pursuits**, investment activity or any activity intended to realize a profit for either an **insured person** or others.

However, this exclusion does not apply to:

- a. Volunteer work for an organized charitable, religious or community group;
 - b. **Incidental business** activity;
 - c. Limited Residence Premises **Business** Liability coverage; or
 - d. Residences held for rentals which are listed on the Declarations Page.

* * * *

8. Intentional Act

Arising out of any criminal, willful, fraudulent, dishonest, intentional or malicious act or omission by any person, or the gaining of any profit or advantage to which an **insured person** is not entitled. We will not cover any amount for which the **insured person** is not financially liable or which are without legal recourse to the insured person. We also will not cover claims for acts or omissions of any person which are intended to result in, or would be expected by a reasonable person to cause, **property damage or personal injury**.

This exclusion applies even if the injury or damage is of a different kind or degree, or is sustained by a different person, than expected or intended. This exclusion does not apply to **bodily injury** if the **insured person** acted with reasonable force to protect any person or property.

* * * *

B. As respects Excess Liability, the following also applies:

This insurance does not provide coverage for liability, defense costs or any other cost or expense:

* * * *

4. Director's Errors or Omissions

Arising out of any **insured person's** acts, errors or omissions as an officer or member of the board of directors of any corporation or organization. This exclusion does not apply to an **insured person's** actions for a non-profit corporation or organization, a condominium or cooperative association or coverage provided under the Limited Charitable Board Directors and Trustees Liability coverage of this policy.

(*Exhibit 2*, at pp. AIG00062–AIG 00064).

9 5. Plaintiffs sued Langemeier in Maricopa County Superior Court Case
10 Number CV2010-051209 captioned *Marcus Labertew aka Mark Labertew; John*
11 *McDermott, and Jennifer McDermott v. Fred Auzenne and Lorel Langemeier* (the
12 “Lawsuit”). (**Exhibit 3**, Plaintiffs’ First Amended Complaint “FAC” filed May 8,
13 2012).

6. The Lawsuit proceeded for nearly three years before Langemeier's counsel tendered Langemeier's defense to Defendants by letter dated January 15, 2013. The two-page letter included the operative Plaintiffs' FAC (*Exhibit 3*), eight pages of a deposition of John McDermott, and seven pages of a January 4, 2013 oral argument transcript, and indicated trial was to start February 25, 2013, some 41 days after the date of the letter. (*Exhibit 4*, Letter from Nathan D. Meyer to Mike Menath Insurance, Inc. dated January 15, 2013 with original attachments ("Tender Letter")).

7. Langemeier's attorney stated that the FAC (*Exhibit 3*) made a defamation claim, and that Mr. McDermott testified the alleged defamatory remarks caused him bodily injury. (*Exhibit 4*, p. 1). Langemeier's attorney also stated that comments in the January 4, 2013 summary judgment oral argument hearing indicated for the first time that Plaintiffs in the Lawsuit contended Langemeier's defamatory comments were made in her personal capacity rather than in her capacity as an agent for BioNovix. (*Id.*).

1 8. The Tender Letter cites and quotes Arizona cases and law supporting the
2 basis for the tender. (*Id.*). As a result, Defendants consulted Arizona coverage
3 counsel. (*Exhibit 5*, at AIG00179; *Exhibit 6*,² Applebee Dep., at 29:11-17).

4 9. Plaintiffs' FAC alleges Langemeier was an officer and director of a
5 corporation called BioNovix (*Exhibit 3*, at ¶¶ 2, 15, 17), which was engaged in the
6 sales of health products internationally. (*Id.*, at ¶ 6; *see also Exhibit 7*,³ Langemeier
7 Dep., at 23:8-14).

8 10. Langemeier was also one of the largest percentage of BioNovix's
9 shareholders. (*Id.*, at 28:11-18).

10 11. Plaintiff Labertew, in an email dated January 15, 2009, discusses his
11 perceived role and achievements with BioNovix, indicating he "increased sales over
12 prior year by \$300K." (*See Exhibit 8*, Email from Labertew to Langemeier dated
13 January 15, 2009, JABURG 005665-67).

14 12. Plaintiff Labertew, in an email dated February 25, 2008, discusses
15 BioNovix "revenue" from "January" as totaling \$462K. (*See Exhibit 9*, Email from
16 Labertew to Langemeier dated February 25, 2008, JABURG 005652).

17 13. BioNovix employed both Jack McDermott ("McDermott") and Mark
18 Labertew ("Labertew"). (*Exhibit 3*, at ¶¶ 7 and 8).

19 14. Plaintiffs' FAC alleges a series of events involving their employment
20 with BioNovix and Langemeier's conduct to support the Judgment.⁴ (*Id.*, at ¶¶ 6-50).

21 15. Langemeier's alleged tortious conduct in Plaintiffs' FAC included or
22 involved discussing (or failing to discuss) BioNovix business issues with Plaintiffs
23 (*Id.*, at ¶¶ 8, 9, 10, 11), conference or investor calls related to BioNovix (*Id.*, at ¶¶ 12,
24 13, 14), BioNovix press releases (*Id.*, at ¶ 15), assertions concerning a company

25 ² Excerpts of the deposition of Brian Applebee dated March 20, 2018 are collectively
26 attached as *Exhibit 6*.

27 ³ Excerpts of the deposition of Loral Langemeier dated July 27, 2012 are collectively
28 attached as *Exhibit 7*.

29 ⁴ See Defendants' Statement of Facts, ¶ 33 *supra* for defined term. (*Exhibit 16*,
30 Judgment against Loral Langemeier).

1 “move” and/or assets (*Id.*, at ¶ 16), BioNovix’s Korean operations (*Id.*, at ¶ 17),
2 BioNovix server issues (*Id.*, at ¶ 18), closure of the BioNovix office (*Id.*, at ¶ 19),
3 Plaintiffs’ Korean business trip, alleged theft of BioNovix’s business, alleged
4 misrepresentations of Plaintiffs’ activities to Korean distributors and/or investor(s),
5 and BioNovix compliance with Korean law (*Id.*, at ¶¶ 20-22), and the termination of
6 Plaintiffs from BioNovix. (*Id.*, at ¶¶ 24-26).

7 16. As of January 2009, after the other two BioNovix board members
8 resigned, Langemeier stated “I am the board.” She also described herself as “the last
9 one standing.” (*Id.*, at ¶ 15).

10 17. Plaintiffs’ FAC (***Exhibit 3***) Count I – was based on defamatory
11 statements that were made by Langemeier to “public, to customers, to distributors,
12 shareholders and vendors that Plaintiffs had, in the course of their employment with
13 defendants [BioNovix] converted corporate [BioNovix] assets, taken distributors
14 property, and acted in a disloyal and unprofessional manner toward BioNovix.” (*Id.*,
15 at ¶¶ 27-30; *see also Exhibit 10*, Plaintiffs’ Responses to Defendants’ First Set of
16 Interrogatories dated January 19, 2018, at 2:8-3:4).

17 18. Plaintiffs’ FAC (***Exhibit 3***) Count I – further defined the defamatory
18 statements made by Langemeier as being “during conference calls with independent
19 distributor and investors [...]” discussing the business of BioNovix. (***Exhibit 3***, ¶ 30;
20 *see also Exhibit 10*, Plaintiffs’ Responses to Defendants’ First Set of Interrogatories
21 dated January 19, 2018, at 2:8-3:4).

22 19. Plaintiffs’ FAC (***Exhibit 3***) Count III – False Arrest, False Imprisonment
23 and Malicious Prosecution was predicated on the allegations that John McDermott was
24 “sent to South Korea by BioNovix, Inc. to address structural and business compliance
25 issues with the BioNovix Korea affiliated entity” (***Exhibit 3***, at ¶ 39; *Id.*, at ¶¶ 20-22),
26 and that Langemeier had “problems with Korean distributors, which problems
27 [Langemeier] falsely attributed to plaintiff John McDermott” (*Id.*, at ¶ 40), “caus[ing]
28 [McDermott] to be arrested and charged with a crime in Korea.” (*Id.*, at ¶ 41).

1 20. Plaintiffs' FAC (*Exhibit 3*) Count IV – Tortious Interference with
2 Contractual Relations was predicated on the "Plaintiffs' contracts with BioNovix" and
3 the termination of Plaintiffs' employment with BioNovix (*Id.*, at ¶¶ 42-44) and
4 Plaintiffs' "business expectancies" with BioNovix and others. (*Id.*, at ¶ 45). The
5 BioNovix post-termination defamatory press releases were likely caused by
6 Langemeier as the only member of the BioNovix board at the time of publication. (*Id.*,
7 at ¶ 15).

8 21. The basis for Mr. McDermott's stroke (bodily injury) was based on
9 events Langemeier caused in South Korea while Mr. McDermott was on BioNovix
10 business, which led to his arrest. (*Exhibit 3*, at ¶¶ 20, 21, 40-42; *Exhibit 10*, at 6:26-
11 8:14).

12 22. The partial transcript sent by Langemeier's attorney with the Tender
13 Letter (*Exhibit 4*) addressed Plaintiffs' argument for Langemeier's personal liability.
14 They argued she was not acting in the authorized capacity as a representative of
15 BioNovix. Specifically, they argued "because there was not a legitimately constituted
16 board of directors, Loral Langemeier's statements weren't made on behalf of the
17 company.... This has been [Plaintiffs'] contention throughout this whole litigation
18 going back to day one, is that Loral Langemeier was not authorized as **one board**
19 **member** to take any actions on the part of [BioNovix]." (Emphasis added). (*Exhibit*
20 *4*, specifically Exhibit 3 to Tender Letter, Transcript of Oral Argument, at 31:17-24).

21 23. Plaintiffs have explained in their briefing in this action "Plaintiffs
22 contended in the underlying state tort case that the BioNovix Board of Directors lacked
23 a quorum, was not properly constituted and Langemeier could not act on behalf of the
24 corporation, BioNovix, Inc. Therefore, Langemeier was not in the pursuit of a
25 business purpose when she wronged the Plaintiffs" ([Doc. 49], at 7:5-7) because "it is
26 undisputed in this case that Defendant Langemeier claimed to be the only director."
27 (*Id.*, at 7:13-15).

28 24. Plaintiffs' explanation for Langemeier's personal liability is that
Langemeier was the sole remaining board member, her conduct could not constitute

1 the acts of a fully constituted board of directors, which might have given her certain
2 immunities or privileges from liability. ([Doc. 49], at 7:5–28–8:1–24).

3 25. On January 28, 2013, Nathan Meyer, counsel for Langemeier, forwarded
4 one additional document to Defendants, a Declaration of Jack McDermott, and
5 explained in the attendant email it was for the purpose of demonstrating an alleged
6 bodily injury. (*Exhibit 11*, Email from Meyer to Wheeler dated January 28, 2013 with
7 attached Declaration).

8 26. The Declaration of Jack McDermott alleges McDermott had a stroke “as
9 a direct result of the stress caused by [Langemeier’s]” actions in connection with
10 BioNovix. (*Exhibit 11*, Declaration in its entirety, and specifically at ¶ 14.)

11 27. Defendants considered the documents received from Nathan Meyer on
12 behalf of Langemeier with attachments, and responded to Langemeier and her counsel
13 by letter dated February 4, 2013. (*Exhibit 12*, Letter to Langemeier dated February 4,
14 2013; *Exhibit 6*, Applebee Dep., at 22:10-25; 23:10-23).

15 28. Defendants’ letter (*Exhibit 12*) described that they were advising
16 Langemeier of their “current position with respect to coverage,” that based on the
17 documents presented by Langemeier’s counsel it appeared that coverage was
18 inapplicable, but to the extent Langemeier or her counsel disagreed, they were asked to
19 provide nine categories of information to assist Defendants in further evaluating the
20 claim. (See *Exhibit 12* in its entirety).

21 29. The Defendants’ letter (*Exhibit 12*) described that their “investigation
22 was ongoing” and that “additional information and/or investigation may result in re-
23 evaluation.” (*Id.* at p. 2).

24 30. Neither Langemeier nor her counsel provided additional information of
25 any kind to Defendants in response to the request in the Defendants’ letter. (*Exhibit 6*,
26 Applebee Dep., at 22:10-25; 23:10-23).

27 31. Brian Applebee (the Defendants’ Fed.R.Civ.P. 30(b)(6) witness) testified
28 that the Defendants believed the claims made in the subject FAC (*Exhibit 3*), based on

1 the materials provided to the Defendants, were excluded by exclusions contained in the
2 subject insurance policies. (*Exhibit 6*, Applebee Dep. at 22:10-13; 28:7-12; 67:12-17).

3 32. Trial in the Lawsuit started on February 25, 2013. (*Exhibit 13*, Trial
4 Minute Entry – Day 1, dated February 25, 2013 (filed March 1, 2013).

5 33. During the third day of trial in the Lawsuit, on February 27, 2013, the
6 Parties to the Lawsuit agreed to the material terms of a settlement, including a \$1.5
7 million stipulated Judgment against Langemeier. (*Exhibit 14*, Trial Minute Entry–
8 Day 3, dated February 27, 2013 (filed March 1, 2013); *see also* [Doc. 42], at 3:15-17;
9 [Doc. 46], at 3:23-25).

10 34. The Parties to the Lawsuit further entered into a “*Damron*” Agreement,
11 purportedly assigning Langemeier’s rights under Defendants’ policies to Plaintiffs.
12 (*Exhibit 15*, the “*Damron*” Agreement; [Doc. 42], at 3:19-21; [Doc. 46], at 3:26-4:2;
13 [Doc. 49], at 2:18-28; 3:1).

14 35. Judgment was later entered against Langemeier in the Lawsuit in the
15 amount of \$1.5 Million, signed by Judge Gordon on June 3, 2013 and filed on June 5,
16 2013 (the “Judgment”). (*Exhibit 16*, Judgment against Loral Langemeier).

17 36. Plaintiffs’ “Amended Complaint” in this action [Doc. 42] seeks to
18 recover the amount of the Judgment (*Exhibit 16*) by way of this action, [Doc. 42], at
19 ¶¶ 14, 19], and alleges “bad faith.” (*Id.*, at ¶ 15).

20 37. Plaintiffs herein also appear to try to claim entitlement to claims for both
21 Langemeier’s alleged emotional distress, as well as Plaintiff McDermott’s alleged
22 emotional distress. (*Exhibit 17*, Letter from Philip Nathanson to Steven Mesaros dated
23 August 24, 2018).

24 38. Plaintiffs’ purported emotional distress claims for themselves and
25 Langemeier are not included in Plaintiff’s [sic] Amended Complaint [Doc. 42], nor in
26 Plaintiffs’ Rule 26(a) Initial (and only) Disclosure Statement dated January 12, 2018.
27 (*Exhibit 18*).
28

1 **RESPECTFULLY SUBMITTED** this 28th day of September, 2018.

2 **RENAUD COOK DRURY MESAROS, PA**

3 By /s/Steven G. Mesaros

4 Steven G. Mesaros

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9 *Attorneys for Defendants Chartis*

10 *Property Casualty Company and 21st*

11 *Century North American f/k/a American*

12 *International Insurance Company*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this 28th day of September, 2018, I electronically
15 transmitted the foregoing document to the Clerk's Office using the CM/ECF System
16 for filing and transmitted a Notice of Electronic Filing to the following CM/ECF
17 participants:

18 Honorable David G. Campbell
UNITED STATES DISTRICT COURT
19 Sandra Day O'Connor
20 U.S. Courthouse, Suite 623
21 401 W. Washington Street, SPC 58
22 Phoenix, AZ 85003-2156

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28 /s/Vicki L. Cobbs